54

(1)

U.S.
FILED
06149 MAY 8 - 2007
OFFICE OF THE CLERK

No. 06-__

IN THE

Supreme Court of the United States

LEILA J. LEVI, LEVI M. CLANCY, a minor,
by and through his guardian ad litem, LEILA J. LEVI,
Petitioner,

v.

JACK O'CONNELL, in his official capacity as
Superintendent of Education for the State of California,
CALIFORNIA DEPARTMENT OF EDUCATION
Respondent.

On Petition for Review to the
Supreme Court of the State of California

PETITION FOR A WRIT OF CERTIORARI

RICHARD D. ACKERMAN *
MICHAEL W. SANDS, JR.
PRO-FAMILY LAW CENTER
41690 Enterprise Circle North, Ste. 216
Temecula, California 92590
(951) 308-6454

* Counsel of Record

Counsel for Leila Levi &
Levi M. Clancy

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED FOR REVIEW

1. Does the Individuals with Disabilities Education Act ("IDEA") expressly preclude any determination that an extremely gifted child is a "special needs" child capable of being qualified for funding related to his or her individual educational needs?

2. Does the No Child Left Behind Act ("NCLBA") exclude extremely gifted children from receiving a publicly funded education tailored to their highly specialized psychosocial needs?

LIST OF ALL PARTIES

The Petitioners are Leila J. Levi, and Levi M. Clancy, a minor by and through his guardian ad litem, Leila J. Levi.

The Respondents are the California Department of Education and Jack O'Connell, in his official capacity as Superintendent of Education for the State of California.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES	ii
TABLE OF AUTHORITIES	iv
CITATIONS TO OPINIONS AND ORDERS ENTERED IN CASE	1
STATEMENT OF JURISDICTIONAL BASIS	1
CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	6
ARGUMENT FOR REVIEW	9
I. TOO NARROW OF A DEFINITION OF "SPECIAL NEEDS" UNDER THE "IDEA" AND "NCLBA" PLACES CHILDREN AT RISK OF BEING DENIED EQUAL EDUCATIONAL OPPORTUNITY	9
CONCLUSION	11
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	16a
APPENDIX D	20a

TABLE OF AUTHORITIES

CASES — Page

Austin Independent School Dist. v. Robert M., 168 F.Supp.2d 635 (W.D.Tex. 2001) 10
Levi v. O'Connell, 144 Cal.App.4th 700, 50 Cal.Rptr.3d 691 (2006) 7, 9
Student Doe v. Com. of Pa., 593 F.Supp. 54 (E.D. Pa 1984) 10
Susan N. v. Wilson School Dist., 70 F.3d 751 (3rd Cir. 1995) 10

CONSTITUTIONAL PROVISIONS

Ninth Amendment - United States Constitution 2
Fourteenth Amendment - United States Constitution 2
California Constitution, Article IX, Section 5 8

STATUTES

20 U.S.C. § 6301 (No Child Left Behind Act) ..... *passim*
20 U.S.C. § 1400 (Individuals with Disabilities Act) ..... *passim*
20 U.S.C. § 1400(c)(2)(C) 10
20 U.S.C. § 1400 (c)(6)(7) 10
20 U.S.C. § 1401, subd. (3)(A) 8
28 U.S.C. § 1257(a) 2
42 U.S.C. § 1983 8
California Education Code § 52055.57 6
California Education Code § 52058.1 6
California Education Code § 52059 6
California Education Code § 56026 6

LEGISLATIVE MATERIALS

Education for All Handicapped Children Act of 1975 (Public Law 94-142) 3

TABLE OF AUTHORITIES

MISCELLANEOUS Page

115 A.L.R. 5th 183 10

Winner, E. (2000), *The Origins and Ends of Giftedness*. American Psychologist (Vol. 55, No. 1) 9

IN THE

Supreme Court of the United States

No. 06-___

LEILA J. LEVI, LEVI M. CLANCY, a minor,
by and through his guardian ad litem, LEILA J. LEVI,
Petitioner,

v.

JACK O'CONNELL, in his official capacity as
Superintendent of Education for the State of California,
CALIFORNIA DEPARTMENT OF EDUCATION
Respondent.

**On Petition for Review to the
Supreme Court of the State of California**

PETITION FOR A WRIT OF CERTIORARI

CITATIONS TO OPINIONS AND ORDERS ENTERED IN CASE

Included in the Appendix are the California Supreme Court's final order denying review, the published opinion of the California Court of Appeal, and the judgment of the California Superior Court (Sacramento).

STATEMENT OF JURISDICTIONAL BASIS

This case comes before the Court following a California Supreme Court final order denying review of a published opinion of the California Court of Appeal. The California

Court of Appeal opinion interprets the United States Constitution and two federal statutes. Jurisdiction is proper pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THIS CASE

This case implicates the Ninth and Fourteenth Amendments to the United States Constitution. It also implicates the Individuals with Disabilities Education Act ("IDEA") and the No Child Left Behind Act ("NCLBA").

The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Individuals with Disabilities Act, as set forth at 20 U.S.C. § 1400, states in relevant part:

> (a) Short title This chapter may be cited as the "Individuals with Disabilities Education Act".
>
> (b) Omitted
>
> (c) Findings The Congress finds the following:
>
> (1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full

participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142)—(A) the special educational needs of children with disabilities were not being fully met; (B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity; (C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers; (D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and (E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expec-

tations for such children and ensuring their access in the general curriculum to the maximum extent possible; (B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home; (C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent; (D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate; (E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them—(i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and (ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible; (F) providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs; and (G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results.

(6) While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law. [. . .].

The No Child Left Behind Act of 2001, as set forth at 20 U.S.C. § 6301, states in relevant part:

The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments. This purpose can be accomplished by

(1) ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement;

(2) meeting the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance;

(3) closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers;

(4) holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education;

(5) distributing and targeting resources sufficiently to make a difference to local educational agencies and schools where needs are greatest;

(6) improving and strengthening accountability, teaching, and learning by using State assessment systems designed

to ensure that students are meeting challenging State academic achievement and content standards and increasing achievement overall, but especially for the disadvantaged;

(7) providing greater decisionmaking authority and flexibility to schools and teachers in exchange for greater responsibility for student performance;

(8) providing children an enriched and accelerated educational program, including the use of schoolwide programs or additional services that increase the amount and quality of instructional time;

(9) promoting schoolwide reform and ensuring the access of children to effective, scientifically based instructional strategies and challenging academic content;

(10) significantly elevating the quality of instruction by providing staff in participating schools with substantial opportunities for professional development;

(11) coordinating services under all parts of this subchapter with each other, with other educational services, and, to the extent feasible, with other agencies providing services to youth, children, and families; and

(12) affording parents substantial and meaningful opportunities to participate in the education of their children.

STATEMENT OF THE CASE

The California Department of Education and California Superintendent of Education are responsible for carrying out provisions of federal law governing the education of all children within the State of California. *California Education Code* §§ 52055.57, 52058.1, 52059. This includes children with special needs. *California Education Code* § 56026.

The California Court of Appeal has recognized that carrying out these duties affects many extremely gifted children

with specialized needs. *Levi v. O'Connell*, 144 Cal.App.4th 700, 708, 50 Cal.Rptr.3d 691, 697, fn. 4 (2006).

Petitioner Levi Clancy is a highly gifted child who was born in 1990. At all times relevant to this action, he was of California's mandatory school attendance age. If Clancy does not attend school, he is a truant. While he is quickly approaching legal adulthood, this case is capable of repetition and likely to evade review. Indeed, the California Court of Appeal specifically recognized that there is a significant debate as to how to handle the many children similarly situated to Petitioner. *Id.*

Clancy cannot attend a traditional K-12 school because the schools operated by the California Department of Education and his local district, are ill-equipped and unsuitable for highly gifted children and will actually cause more harm to him than if he simply did not attend. Respondents cannot provide for his specific psycho-social and academic needs. Additionally, he has already completed a standard education within the K-12 academic system currently provided for by California.

In 2000, at 9 years of age, Clancy passed the California High School Proficiency exam. He has been attending Santa Monica College since he was 7. As such, no existing secondary school operated by California will or could accept him as a student. If a standard K-12 school did accept Clancy, it would not be able to provide for his specialized needs.

In January 2004, Clancy began attending the University of California at Los Angeles (UCLA). He was performing well at the school and his specific psycho-social and academic needs were being adequately met through the education provided for by this institution of higher learning.

Leila Levi is a single mother and single income earner in her household. She bears exclusive responsibility in terms of

providing for the health and general welfare of her son Levi Clancy. She cannot afford to continue paying for a UCLA education, but there is funding available for special needs children through the IDEA and supplemental school funding at a state level.

The Respondents refuse to pay, or release available supplemental funding, for the education of Clancy because they claim he does not qualify as having "special needs" under federal or state law.

CALIFORNIA CONSTITUTION, Article IX, Section 5, requires that he be provided with a "free education."

Declaratory relief was sought from the California court system in order to determine what type of education must be provided to the minor plaintiff under the California Constitution, United States Constitution, IDEA, NCLBA, and other federal and state provisions.

The California Court of Appeal published an opinion indicating that the 42 U.S.C. § 1983, IDEA and NCLBA do not apply to extremely gifted children, even though the record showed that health care professionals identified Clancy as likely to have "a sense of helplessness," possibly needing "[p]eriodic visits with a psychologist" and as having other unique issues associated with his intelligence and proven inability to integrate in a standardized educational schemata.

Indeed, it is the stated position of the California Court of Appeal, with review being denied by the California Supreme Court, that: "The term "child with a disability" is defined by the referenced section of the IDEA as a child who needs special education and related services by reason of mental retardation, hearing impairments, speech or language impairments, visual impairments, a serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities. (20 U.S.C. § 1401, subd. (3)(A).)" This definition is held to be

strictly construed against highly gifted children. *Levi v. O'Connell*, 144 Cal.App.4th 700, 709, 50 Cal.Rptr.3d 691, 698 (2006).

California's strict definition of the term "disability" has precluded *a priori* the legal conclusion that an extremely gifted child must be provided publicly funded education suitable to his or her specific needs.

ARGUMENT FOR REVIEW

I. TOO NARROW OF A DEFINITION OF "SPECIAL NEEDS" UNDER THE "IDEA" AND "NCLBA" PLACES CHILDREN AT RISK OF BEING DENIED EQUAL EDUCATIONAL OPPORTUNITY

In order to meet the needs of all children within the United States' public school systems, local school districts must be required to fully evaluate a child's needs under the IDEA. It is not always going to be the case that a particular child neatly fits into the IDEA delineated categories as narrowly interpreted by the California courts.

In fact, it is not difficult to imagine that extremely gifted children, or others, will not be able to successfully function in a school setting which is not designed, intended, or able to provide for these students' very individualized and special needs.

While one might be initially inclined to just simply disregard the notion that a gifted child requires special care or services under the IDEA, the United States' scientific community has recognized the isolation, inability to integrate, and unmet needs of such children. Winner, E. (2000) *The Origins and Ends of Giftedness*, American Psychologist (Vo.55, No.1), 159-169.

In looking at the stated purposes of the IDEA, Congress intended to ensure that all students, with any kind of special

needs or disabilities, would be identified and provided with an opportunity for an education that recognizes these students as individuals. 20 U.S.C. § 1400(c)(2)(C). Moreover, it was recognized that "equal protection of the law" is a concern when attempting to identify and serve those children with special needs. 20 U.S.C. § 1400(c)(6)(7).

Unfortunately, California has concluded that extremely gifted children cannot possibly qualify as being "disabled" or having "special needs." However, some federal courts have given proper attention to the needs of such children. *Susan N. v. Wilson School Dist.*, 70 F.3d 751 (3rdCir.1995); *Student Doe v. Com. of Pa.*, 593 F.Supp. 54 (E.D.Pa.1984). Contra see, *Austin Independent School Dist. v. Robert M.*, 168 F.Supp.2d 635 (W.D.Tex.2001).

In fact, California's position on the education of gifted children directly contravene a federal decision recognizing that the IDEA "defines disability broadly" and can include gifted children within the meaning of "disabled." *Susan N.*, supra at 70 F.3d 751, 756. As a result, all children affected by the California Court of Appeal's ruling are essentially precluded from presenting any evidence to demonstrate, before a court or administrative body, that extreme giftedness can be a "disability."

It is respectfully suggested that this Honorable Court exercise its constitutional powers to interpret applicable federal law so as to effectuate its purposes and settle any disagreement that various states or courts may have with Congress on issues related to the education of gifted children. See generally, 115 A.L.R.5th 183 [discussing the difficulties with interpreting law applicable to the needs of gifted children].

In sum, if the California Court of Appeal's opinion is allowed to hold sway as to an automatic exclusion of highly gifted children from being defined as having "special needs," an entire class of persons will have been denied the pro-

tections of law that apply to other similarly situated children having "special needs" of the same kind, but different etiology. Such a conclusion is clearly prohibited by the public policy concerns noted by Congress in its enactment of the IDEA and the NCLBA. Review is necessary to clear up any misconceptions about what was intended by Congress when it enacted the IDEA and NCLBA.

CONCLUSION

Review should be granted in this case.

Respectfully submitted,

RICHARD D. ACKERMAN *
MICHAEL W. SANDS, JR.
PRO-FAMILY LAW CENTER
41690 Enterprise Circle North, Ste. 216
Temecula, California 92590
(951) 308-6454

* Counsel of Record

Counsel for Leila Levi & Levi M. Clancy

May 8, 2007

APPENDIX

APPENDIX A

COURT OF APPEAL, THIRD APPELLATE DISTRICT -
NO. C051722 S148994

[Filed Feb 7 2007]

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LEILA J. LEVI *et al.*,

Plaintiffs and Appellants,

v.

JACK O'CONNELL, as Superintendent of
Public Instruction, etc.,

Defendant andRespondent.

Petition for review DENIED.

APPENDIX B

CERTIFIED FOR PUBLICATION

C051722

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Sacramento)

[Filed Nov 7 2006]

Leila J. Levi *et al.*,

Plaintiffs and Appellants,

v.

Jack O'Connell , as Superintendent of Public Instruction, etc., *et al.*,

Defendants and Respondents.

Appeal from a judgment of the Superior Court of Sacramento County, Raymond Cadei, J. Affirmed.

The Pro-Family Law Center, Richard D. Ackerman for Plaintiffs and Appellants.

Allan J. Keown for Defendants and Respondents.

In this case we consider whether the California Department of Education (CDE)[1] is required to pay for the college education of an extremely gifted student under the age of 16. We conclude it is not. We shall affirm the judgment of dismissal of plaintiffs' action entered following the trial

---

[1] Plaintiffs' action named as defendants both Jack O'Connell as the California Superintendent of Public Instruction and the California Department of Education. For convenience, we shall hereafter simply refer to defendants as CDE.

court's sustaining of CDE's demurrer without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

On February 9, 2004, Leila J. Levi (Levi) filed an original complaint against CDE on behalf of herself and as guardian ad litem for her 13-year-old son Levi M. Clancy (Clancy) (together plaintiffs). After the trial court sustained CDE's general demurrer with leave to amend, plaintiffs filed a first amended complaint. The first amended complaint alleges Clancy, born on October 12, 1990, is a highly gifted child required, as a minor under the age of 16, to attend school under the Compulsory Education Law. (Ed. Code, § 48200, *et seq.*) The first amended complaint alleges, "Clancy cannot attend a traditional K-12 school because the schools operated by CDE, and Clancy's local district, are ill-equipped and unsuitable for highly gifted children and will actually cause more harm to him than if he simply did not attend. Specifically, they cannot provide for his specific psycho-social and academic needs. Additionally, he has already completed a standard education within the K-12 academic system currently provided for by CDE." (Capitalization changed.)

According to the first amended complaint, Clancy started attending Santa Monica College when he was seven, passed the California High School Proficiency exam when he was nine, and began attending the University of California at Los Angeles (UCLA) when he was 13. Levi is a single mother and single income earner in her household who cannot afford to continue paying for Clancy's education at UCLA. The first amended complaint alleges CDE is constitutionally required to provide Clancy with an adequate and suitable free and equal education while he is a minor under the age of 16.

The complaint alleges three causes of action; the first for declaratory relief and/or a writ of mandate, the second for

violation of the equal protection clause of California's Constitution, and the third for damages under the federal civil rights statute. (42 U.S.C.S. § 1983.) The complaint seeks a writ of mandate compelling CDE to provide Clancy with a fair, equal, and funded education suited to his personal needs, a declaratory judgment setting forth the rights and obligations of the parties to this case, general damages as well as special damages in the form of payment of the expenses associated with Clancy's education at Santa Monica College and UCLA, attorney fees, and costs of suit. The trial court sustained CDE's demurrer to all three causes of action without leave to amend and entered a judgment of dismissal.

On appeal plaintiffs challenge the trial court's sustaining of CDE's demurrer to their first cause of action for declaratory relief and/or a writ of mandate. They also claim public policy supports their position on appeal because they are asking for nothing more than what California already offers to students with special needs. They do not challenge the sustaining of CDE's demurrer to their second and third causes of action.[2] In their brief on appeal, plaintiffs admit they are asking this court to establish an education voucher for Clancy's college education during his years of mandatory school attendance. We decline to do so.

---

[2] Plaintiffs' briefs on appeal do not contain any argument regarding the second and third causes of action of the first amended complaint under appropriate headings with meaningful discussion supported by authorities. (Cal. Rules of Court, rule 14(a)(1).) If plaintiffs are making any claim regarding those causes of action, the claim has not been properly made and is rejected on that basis. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1346.)

DISCUSSION

I. *Standard of Review*

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.]" *(Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967; *see Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) On appeal we review the legal sufficiency of the complaint de novo, "i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.]" *(Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) The question before us is whether "the plaintiff has stated a cause of action under any possible legal theory. [Citation.]" *(Aubry v. Tri-City Hospital Dist., supra,* at p. 967.)

II. *Plaintiffs' Cause of Action For Declaratory Relief*

While Clancy is under the age of 16 and subject to the compulsory full-time education requirements, plaintiffs claim CDE legally owes him an adequate, free and equal education providing for his specific individualized needs. If Clancy is not provided with the funding necessary to attend a university appropriate to his learning needs, plaintiffs claim they will be forced to violate the compulsory education law. In their first cause of action, plaintiffs allege these circumstances give rise to a justiciable controversy over the parties' respective rights and duties entitling them to declaratory relief. Plaintiffs primarily rely on section 5 of article IX of the California Constitution (section 5). However, they also claim education guarantees under unspecified parts of the United States Constitution, the federal No Child Left Behind Act of 2001

(20 U.S.C. § 6301 et seq.), and the federal Individuals with Disability Education Act (IDEA). (20 U.S.C. .§ 1400 *et seq.*) Plaintiffs claim there exists a related controversy as to whether Clancy was excluded from the class of children protected by California's special education law. (Ed. Code, §§ 56000 *et seq.*)

On appeal, plaintiffs claim the trial court erred in concluding they had not stated a cause of action for declaratory relief because they are entitled to a judicial declaration of the educational rights of an extremely gifted child.

"'The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject.'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79, quoting 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 817, p. 273.) CDE contends plaintiffs have failed to allege facts sufficient to establish an actual controversy between themselves and CDE independent of the current lawsuit. *(City of Cotati v. Cashman, supra,* at p. 80; *California Assn. of Private Special Education Schools v. Department of Education* (2006) 141 Cal.App.4th 360, 377-378*; Brownfield v. Daniel Freeman Marina Hosp.* (1989) 208 Cal.App.3d 405, 410.) We disagree. The first amended complaint alleges sufficient specific facts regarding Clancy's present educational circumstances to establish an actual, current controversy concerning CDE's constitutional and statutory obligation to fund an appropriate education, in this case a college education, for Clancy.

CDE contends plaintiffs have not sufficiently pled a cause of action for declaratory relief because there is no right on the part of plaintiffs to or corresponding duty on the part of CDE to provide the relief plaintiffs seek.

" 'Strictly speaking, a general demurrer is not an appropriate means of testing the merits of the controversy in a

declaratory relief action because plaintiff is entitled to a declaration of his rights even if it be adverse.' [Citations.] However, 'where the issue is purely one of law, if the reviewing court agreed with the trial court's resolution of the issue it would be an idle act to reverse the judgment of dismissal for a trial on the merits. In such cases the merits of the legal controversy may be considered on an appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend and the opinion of the reviewing court will constitute the declaration of the legal rights and duties of the parties concerning the matter in controversy.' [Citations.]" *(Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 24.) The issue here is purely a question of law, which we resolve adversely to plaintiffs.

The California Legislature has been constitutionally required to provide for a system of common schools in California since the first state Constitution was adopted in 1849.[3] (Cal. Const., art IX, § 3.) Since the Constitution of 1879 this constitutional requirement has included a free school guarantee. (Cal. Const., art. IX, § 5; *Hartzell v. Connell.* (1984) 35 Cal.3d 899, 906 (*Hartzell*).) Specifically, section 5 provides, "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established." (Cal. Const., art. IX, § 5, italics added.)

In section 5, the use of "the term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the Legislature to provide 'a' system of common schools means one system which shall be applicable to all the

---

[3] Article IX of the California Constitution makes public education a matter of statewide rather than local concern. *(Kennedy v. Miller* (1893) 97 Cal. 429, 431; *Hall v. City of Taft* (1956) 47 Cal.2d 177, 179, 181, superseded by statute on other grounds as noted in *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal.App.4th 1005, 1013, fn. 5.)

common schools within the state." (*Kennedy v. Miller, supra,* 97 Cal. at p. 432, italics omitted.) Under section 5, the "educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 596, superseded by statute as stated in *Crawford v. Huntington Beach Union High School Dist.* (2002) 98 Cal.App.4th 1275, 1286; see *Piper v. Big Pine School* Dist. (1924) 193 Cal. 664, 669, 673 (*Piper*).) California children have an enforceable right to attend such a school (*Piper, supra,* at p. 669) and to participate without paying fees in all of the educational activities—curricular or extracurricular—offered by such schools. (*Hartzell, supra,* 35 Cal,3d at p. 911.)

However, this still leaves the question—what are the "common schools" of the state that must be provided free under a single uniform statewide system? The early case of *Los Angeles County v. Kirk* (1905) 148 Cal. 385 (Kirk), provides the answer. In Kirk the California Supreme Court rejected a county's attempt to compel the Superintendent of Public Instruction to include the average daily attendance of kindergarten students in his apportionment of the State School Fund to the various counties. The high court held the fact that the Legislature declared a kindergarten adopted by a district to be part of the public primary schools did not operate to bring it within the uniform and mandatory system of common schools of the state. (*Id.* at pp. 390-391.) The court distinguished the public schools designated by section 6 of article IX of the California Constitution from the common schools of section 5, which it concluded were those schools of the state identified in section 6 of article IX as being exclusively supported by the State School Fund. (*Los Angeles County v. Kirk, supra,* at pp. 388-389.)

Section 6 of article IX of the California Constitution has since been amended a number of times and now provides, in relevant part, "[t]he Public School System shall include all

kindergarten schools, elementary schools, secondary schools, technical schools, and state colleges,." However, the same section now provides: "The entire State School Fund shall be apportioned in each fiscal year in such manner as the Legislature may provide, through the school districts and other agencies maintaining such schools, for the support of, and aid to, *kindergarten schools, elementary schools, secondary schools, and technical schools* . . . ." (Cal. Const., art. IX, § 6, italics added.) Applying the reasoning of *Kirk, supra, 148* Cal. 385, the common schools of California under section 5 are the schools that provide what has become known as grades K through 12. Colleges and universities are not included. That is, section 5 constitutionally provides for a single standard and uniform system of free public K-12 education. The free school guarantee of section *5* does not provide for free college education.

Nor does the free school guarantee mandate K-12 education individually tailored to each student's specific and particularized needs. Section *5* requires the state to maintain a regular, standard system of public K-12 education. *(Kennedy v. Miller, supra, 97* Cal. at p. 432; *Serrano v. Priest, supra,* 5 Cal.3d at p. 596; Piper, supra, 193 Cal. at pp. 669, 673.)[4]

---

[4] We emphasize we are considering in this case plaintiffs' allegations that CDE *is required* under current law to provide Clancy with a suitable or appropriate education, which in his case amounts to a college education. We are not addressing whether CDE should or should not (within the ordinary system of K-12 education), promote a policy of addressing students' individual needs to every extent possible. We are aware there is significant debate in the field of education regarding the educational needs of gifted and highly gifted children. (*See*, e.g., Davidson, Genius Denied: How to Stop Wasting Our Brightest Young Minds (2004); Colangelo, A Nation Deceived: How Schools Hold Back America's Brightest Students (2004).) We are not expressing an opinion on such issues, which are matters of public policy properly addressed to the Legislature or electorate, not the courts. (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 19, 30.)

Naturally, such standard system should provide a high quality education for all the students of our state. State and federal law recognizes this. The federal No Child Left Behind Act of 2001 states: "The purpose of this title [20 USCS §§ 6301 *et seq.*] is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." (20 U.S.C. § 6301.) California has adopted programs to implement the requirements of the federal No Child Left Behind Act. (*See, e.g.*, Ed. Code, §§ 52055.57, 52058.1, 52059.) California administers achievements tests (Ed. Code, §§ 60640) and a high school exit examination. (Ed. Code, § 60851.) California monitors its schools through a public school performance accountability program. (Ed. Code, § 52051 et seq.) However, plaintiffs have not cited us to, and we have not found, anything in the federal No Child Left Behind Act or the implementing California law that requires K-12 public education meet every student's particularized educational needs.[5]

The Legislature has declared its intent that "all *individuals with exceptional needs* have a right to participate in free appropriate public education and special educational instruction and services for these persons are needed in order to ensure the right to an appropriate educational opportunity

---

[5] Plaintiffs have cited us to Education Code section 66030, claiming it states a mandate that "'public education in California strive to provide [. . .] each California[n], .a reasonable opportunity to develop his or her potential.' " Plaintiffs misquote the section, which actually provides: "It is the intent of the Legislature that public higher education in California strive to provide . . .each Californian, . . . a reasonable opportunity to develop fully his or her potential." "Public higher education" refers to California Community Colleges, California State Universities, and each campus of the University of California. (Ed. Code, § 66010, subd. (a).) Section 66030 is irrelevant to whether the Legislature must tailor its K-12 education program to provide each student with individualized education.

to meet their unique needs." (Ed. Code, § 56000, italics added.) However, the term "individuals with exceptional needs" as used in this statute is specifically defined as children who have been identified as having a disability within the meaning of "subparagraph (A) of paragraph (3) of Section 1401 of Title 20 of the United States Code [IDEA]." (Ed. Code, § 56026, subd. (a).) The term "child with a disability" is defined by the referenced section of the IDEA as a child who needs special education and related services by reason of mental retardation, hearing impairments, speech or language impairments, visual impairments, a serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities. (20 U.S.C. § 1401, subd. (3) (A).)

Plaintiffs' first amended complaint alleges Clancy is a highly gifted child who began attending college at seven, passed the high school exit exam at nine, and started attending UCLA when he was 13. It is alleged he has completed a standard education within the K-12 academic system. There are no allegations he needs special education and related services by reason of any of the disabilities or impairments listed in the IDEA. Therefore, he does not come within the provisions of the IDEA and he is not a child with exceptional needs as defined by California's special education law. (Ed. Code, § 56000 *et seq.*) We also note the "free appropriate public education" guaranteed by the IDEA is limited to appropriate preschool, elementary and secondary education. (20 U.S.C. § 1401, subd. (9)(C).) The IDEA does not guarantee appropriate free college education.

Plaintiffs argue the mandate to provide an education suited to the specific needs and abilities of each child was recognized in *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 (*Hayes*). *Hayes is* a subvention case and the issue on appeal in *Hayes* was whether certain special education programs for children with disabilities

"constituted new programs or higher levels of service mandated by the state entitling the school districts to reimbursement under section 6 of article XIII B of the California Constitution and related statutes for the cost of implementing them or whether these programs were instead mandated by the federal government for which no reimbursement is due." *(Hayes, supra,* at p. 1570.) In considering this subvention issue, this court described the legal and historical context of the federal and state statutes governing education for the disabled and noted that principles of equal protection formed a basis for their enactment. (*Id.* at pp. 1582-1592.) The opinion of this court, however, did not consider or suggest that all children have a constitutional right to an education specifically tailored to their individual needs and abilities. Such issue was not presented and obviously, cases are not authorities for propositions not considered. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.)

In summary, Clancy does not have a right to a free college education under the California constitutional free school guarantee of section 5.[6] Nor are there any applicable state or federal statutes requiring that he be provided free college education as being the appropriate education individually tailored to his particular needs as a highly gifted child.[7]

---

[6] Plaintiffs include vague references to unspecified provisions of the United States Constitution in their cause of action for declaratory relief, but have provided no substantive discussion on appeal of their claim, except to point us to Hayes, *supra*, 11 Cal.App.4th 1564, which we have addressed. We do not need to respond further to plaintiffs' federal constitutional references. (*People v. Turner, supra*, 8 Cal.4th at p. 214, fn. 19; *Heavenly Valley v. El Dorado Bd. of Equalization, supra*, 84 Cal.App.4th at p. 1346.)

[7] California does have a gifted and talented pupil program. (Ed. Code, § 52200 et seq.) The governing boards of individual school districts may "elect" to provide programs pursuant to such state law. (Ed. Code, § 52206, subd. (a).) Plaintiffs' first amended complaint does not allege there

We agree with the trial court that plaintiffs' allegations regarding the application of the truancy law to them (Ed. Code, § 48200 *et seq.*) are completely speculative and inadequate to plead a justiciable controversy. The truancy laws are not being applied to Clancy. And finally, the complaint affirmatively alleges Clancy is currently attending UCLA.

III. *Plaintiffs' Cause of Action For A Writ Of Mandate*

Plaintiffs' first amended complaint designates the first cause of action as being for "declaratory relief and/or writ of mandate[.]" (Capitalization omitted.) As part of the allegations of such cause of action, plaintiffs allege the defendants have "a ministerial duty to provide an adequate, fair and equal education" to Clancy. Plaintiffs' prayer for relief requested "a writ of mandate compelling defendants to provide [Clancy] with a fair, equal, and funded education suited to his personal needs[.]"

We have concluded CDE does not have a duty to provide Clancy with a free college education as we have explained. For the same reasons, we conclude plaintiffs have not stated a cause of action for mandate and the trial court correctly sustained CDE's demurrer to such cause of action.

IV. *Public Policy As Reflected In Education Code Section 56000*

Plaintiffs final argument on appeal contends public policy supports their position because they are "asking for nothing more than what California already deems to be appropriate

---

was no such program available for Clancy or that the program available was inadequate. The first amended complaint alleges only that Clancy cannot attend a "traditional" K-12 school because the schools operated by CDE and Clancy's local district are "ill-equipped and unsuitable[,]" will "cause [him] harm" and "cannot provide for his specific psycho-social and academic needs." Plaintiffs' first amended complaint does not name as a defendant Clancy's local school district.

for students with highly specialized needs."[8] (Capitalization omitted.) Plaintiffs cite Education Code section 56000, which states that individuals with exceptional needs have the right to an appropriate educational opportunity to meet their unique needs. Plaintiffs claim Clancy has unique, exceptional and special needs and that section 56000 states a philosophical framework that demands all students of the age for compulsory education be provided with a tailored education.

As we have already stated, section 56000 (educational instruction and services to individuals with exceptional needs) is limited to children with disabilities and impairments. It does not reflect any statement of public policy applicable to all students or to highly gifted students. Under the free school guarantee of the California constitution and the current statutes children have a right to a standard, free public K-12 education. Plaintiffs allege Clancy has completed such an education. Plaintiffs have not sought to compel anything besides a free college education. Clancy is not entitled to such relief.

V. *Plaintiffs' Failure To Plead Prior Presentation Of A Government Tort Claim*

As we have rejected the merits of plaintiffs' claim that Clancy is entitled to have his college education funded by CDE, we need not address CDE's contention that any claim for money damages is precluded by plaintiffs' failure to plead prior presentation of a claim with the State Board of Control (Gov. Code, § 900.2, subd. (b)—now the Victim Compensation and Government Claims Board). (See Gov. Code, § 900 *et seq.*)

---

[8] Plaintiffs do not make a constitutional equal protection claim in this argument and have not challenged the trial court's ruling on their second and third causes of action. (See, ante, fn. 2.)

DISPOSITION

The judgment of dismissal is affirmed. Each party shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(a) (4).)

CANTIL-SAKAUYE , J.

We concur:

SCOTLAND, P.J.

MORRISON, J.

APPENDIX C

MARSHA A. BEDWELL, State Bar No. 094860
General Counsel
MICHAEL E. HERSHER, State Bar No.084135
Assistant General Counsel
ALLAN H. KEOWN, State Bar No. 061710
Deputy General Counsel
California Department of Education
1430 N Street, Room 5319
Sacramento, California 95814
Telephone: (916) 319-0860
Facsimile: (916) 319-0155

Attorneys for Respondents/Defendants

(Defendants Exempt from Filing Fees Pursuant to Gov. Code § 6103)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

LEILA J. LEVI, LEVI M. CLANCY, a minor, by and through his guardian ad litem LEILA J. LEVI, Petitoners/Plaintiffs, v. JACK O'CONNELL, in his official capacity as Superintendent of Education for the State of California, CALIFORNIA DEPARTMENT OF EDUCATION, and DOES 1 through 10, Inclusive,) Respondents/Defendants.	Case No. 04AS00459 ORDER GRANTING RESPONDENTS' GENERAL DEMURRER TO PETITIONERS' PETITION/COMPLAINT WITHOUT LEAVE TO AMEND Date: September 30, 2005 Time: 11:00 a.m. Dept.: 25 Judge: Raymond M. Cadei

The General Demurrer of respondents was set for hearing in Department 25 on Friday, September 30, 2005 at 11:00 am. The tentative ruling issued on September 29, 2005 and became the final ruling of the Court after petitioners

requested a hearing as required pursuant to local court rule by 4:00 p.m. on September 29, 2005 and appeared by telephone conference call on September 30, 2005. The Court ruled as follows at the hearing:

The general demurrer is sustained without leave to amend on the basis that the amended petition/complaint does not state facts sufficient to constitute a cause of action. (Code of Civil Procedure section 430.10(e).)

The amended petition/complaint purports to state three causes of action. All three are based on the theory that Levi Clancy, a highly gifted young man who was age 13 at the time this matter was filed in February 2004, and who passed the California High School Proficiency Exam at age 9, is entitled to have respondents pay for his university-level education under the free school guarantee of the State Constitution, Article IX, section 5.

The amended petition/complaint fails to state a cause of action because petitioners have not cited any authority that interprets the State constitutional free school guarantee as extending to a university-level education. Whatever Levi Clancy's age and intellectual potential may be, petitioners have not demonstrated that respondents are legally required to provide him with a university-level education at state expense.

Since respondents are under no legal duty to provide Levi Clancy with a university-level education, the facts alleged in the amended petition/complaint do not constitute a cause of action for declaratory relief or issuance of a writ of mandate. Similarly, the facts alleged in the amended petition/complaint do not constitute a cause of action for violation of the equal protection clause of the California Constitution. Since Levi Clancy has no legal right to a university-level education at state expense, respondents have not denied him equal protection of the law by failing to provide him with one.

Finally, for the same reason, and because petitioners have not demonstrated *that* Levi Clancy has a right *to* a university-level education at state expense under federal law, the amended petition/complaint does not state a cause of action for violation of federal civil rights under 42 U.S.C. section 1983.

With respect to petitioners additional claims that there is a controversy between the parties based upon the federal Individual with Disabilities Education Act (20 U.S.C. sections 1400 et seq.) with respect to a free appropriate education, the Court finds *that* no where does federal law equate "highly gifted" with "disability." Hence, petitioner student does not have any substantive federal right to be enforced. Moreover, in seeking relief in the form of payment for a university-level education, petitioners are seeking relief not available under 20 U.S.C. section 1401(8) (C)

With respect to petitioners additional claims that petitioner student is in danger of being considered to be a truant, the amended petition/complaint discloses on its face *that no attempt has been* made to apply the truancy laws of the State to petitioner *student; no action* has been taken or threatened either to declare him a truant or to impose any penalty against him or his parent based on truant state under the relevant state statutes (Education Code sections 48200, et seq.) The amended petition/complaint affirmatively alleges that plaintiff student is currently attending UCLA and alleges the possibility that he might lawfully be determined to be a truant in merely speculative terms. Indeed, the possibility that he might be a truant under applicable law appears to arise from *the allegation that* his mother can no longer afford to pay the cost of his attendance at UCLA. Presumably, this means that he will have to withdraw from UCLA (although the amended petition/complaint does not allege *that he has* done so) if he is unable to draw on other resources such as financial aid, loans, or other family resources. The amended petition/complaint

does not provide any basis for finding that such other resources would not be available and, thus, does not require the Court to conclude that he *inevitably* will be required to leave UCLA. This further underscores the entirely speculative nature of the allegations *regarding* the truancy laws. The Court therefore finds that the amended petition/complaint does not state facts sufficient *to constitute a cause* of action based on the application of the truancy *statutes* to plaintiff student.

The general demurrer is sustained without leave to amend because the previous deficiencies in the petition/complaint *identified in the* Court's *initial ruling have* not been remedied. The amended petition/complaint has failed to remedy the deficiencies in the original petition/compliant with regard to the claim for a state-funded university education. It also is clear from the face of the amended petition/complaint that the new claims regarding disability statues and truancy are legally insufficient to withstand demurrer based on the facts already alleged in the pleading *and the* applicable law and cannot be amended.

Finally, virtually nothing in the amended petition/ complaint addresses *the* question of prior administrative *proceedings,* and no attempt has been made to seek any review of decisions made in such proceedings. Although it is evident from the documents of which the Court has been asked to take judicial notice that some administrative action has occurred, such action was primarily by the United States Department of Education's Office for Civil Rights. This Court does not have the authority to review any action or non-action of that federal agency. It is therefore clear that plaintiff student cannot state a claim in mandamus, in this Court, for review of any administrative action on his claims,

APPENDIX D

MARSHA A. BEDWELL, State Bar No. 094860
General Counsel
MICHAEL E. HERSHER, State Bar No. 084135
Assistant General Counsel
ALLAN H. KEOWN, State Bar No. 061710
Deputy General Counsel
California Department of Education 1430 N Street Room 5319 Sacramento, California 95814

Telephone: (916) 319-0860 Facsimile: (916) 319-0155

Attorneys for Respondents/Defendants
*(Defendants **Exempt** from Filing Fees Pursuant to Gov. Code § 6103)*

SUPERIOR COURT OF THE STATE OF CALIFORNIACOUNTY OF SACRAMENTO

LEILA J. LEVI, LEVI M. CLANCY, a minor, by and through his guardian ad litem LEILA J. LEVI, Petitioners/Plaintiffs, v. JACK O'CONNELL, in his official capacity as Superintendent of Education for the State of California, CALIFORNIA DEPARTMENT OF EDUCATION, AND DOES I through 10, Inclusive, Respondents/Defendants.	Case No. 04AS00459 JUDGMENT Date: September 30, 2005 Time: 11:00 a.m. Dept.: 25 Judge: Hon. Raymond M. Cadei

This matter came on regularly for bearing on September 30, 2005 in Department 25 of the above-entitled court, the Honorable *Raymond M.* Cadei, Judge, presiding. Petitioners

appeared by their *attorney, Richard D. Ackerman.* Respondents appeared by their attorney, Allan H. Keown.

IT IS ADJUDGED, ORDERED, AND DECREED that a judgment of dismissal with respect to all claims be entered and that Respondents recover costs from Petitioners.